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Hng Hock Seng v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-195–07 OF 2015
VARGHESE GEORGE, HARMINDAR SINGH AND ABDUL KARIM JJCA
16 JANUARY 2017

C

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking — Trafficking of 697.4g methamphetamine — Appeal against conviction and sentence — Drugs sold to police officer acting as agent provocateur — Whether failure to make clear finding as to actual possession or presumed possession under s 37(d) of the Dangerous Drugs Act 1952 ('the DDA') — Whether failure to make clear finding as to overt act of trafficking under s 2 of the DDA or presumed trafficking under s 37(da) of the DDA — Whether break in chain of custody of drug exhibits — Whether common intention established

D

E

Criminal Procedure — Appeal — Jurisdiction of appellate court — Whether present panel of Court of Appeal can re-examine correctness of decision of earlier panel of Court of Appeal in same suit

F

Criminal Procedure — Charge — Amendment — Co-accused acquitted and discharged at end of prosecution case — Whether charge against appellant should be amended to remove element of common intention under s 34 of the Penal Code — Whether charge containing reference to s 34 fatal

G

The appellant was charged with another two co-accused for having acted in furtherance of a common intention to traffic 697.4g of methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') read together with s 34 of the Penal Code ('the Code'). The appellant together with the other two co-accused had sold the drugs to SP4, a police officer who acted as an agent provocateur. The learned trial judge ('judge') had earlier acquitted and discharged all three accused at the end of the prosecution case on the grounds that there was a reasonable doubt as to the drugs in question, namely, whether the drugs adduced into evidence were the same as the ones taken by the police arresting team and later examined and analysed by the chemist. The prosecution appealed against that decision. Only the appellant appeared during the appeal. The other two co-accused could not be traced and the notice of appeal could not be served on them. The appeal against the other two co-accused was then struck out. The Court of Appeal allowed the appeal and

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ordered the appellant to enter his defence. Back in the High Court, after hearing the appellant's defence, the judge found the appellant guilty and sentenced him to death. The judge found that the appellant's defence was a mere denial and an afterthought. The appellant brought the present appeal against this decision based on the following grounds: (a) that the had been no clear finding as to whether the appellant was in actual possession of the dangerous drugs or presumed possession under s 37(d) of the DDA; (b) that there was no clear finding as to whether there was an overt act of trafficking under s 2 of the DDA or presumed trafficking under s 37(da) of the DDA; (c) that the judge had convicted the appellant despite there being clear evidence of break in the chain of custody of the drug exhibits; and (d) that the earlier panel of the Court of Appeal erred in allowing the prosecution's appeal and remitting the case back to the High Court for the appellant to enter his defence without first amending the charge and removing the element of common intention under s 34 of the Code.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) There could not be any doubt that the case against the appellant was that he had entered into negotiations for the sale of the drugs with SP4. The evidence showed that the drugs were physically brought into SP4's car by the second and third accused in the presence of the appellant. That was how the charge of common intention of trafficking was made out against the appellant (see para 26).

(2) The judge did not rely on any presumptions and the case against the appellant was on direct evidence of trafficking under s 2 of the DDA. The overt act was really the sale of the drugs by the appellant with two others which was the subject matter of the charge. The appellant could not have been left in any doubt as to the case against him (see para 27).

(3) The appellant was earlier acquitted on account of there being a break in the chain of evidence. However, this finding was reversed by the Court of Appeal and the appellant was ordered to enter his defence. If the appellant was dissatisfied with this decision, an appeal ought to have been filed to the Federal Court. It was untenable for the appellant to raise the same issue again in the same court in the same case. The present panel of the Court of Appeal was unable to look into the correctness of the decision of the earlier panel of the Court of Appeal. Only the Federal Court could do so (see paras 32–33).

(4) Concerning the alleged failure of the earlier panel of the Court of Appeal to amend the charge when the appeal against the two other co-accused had been struck out, the present panel of the Court of Appeal had no power to look into the correctness of the decision of the earlier panel of the Court of Appeal (see para 34).

(5) The charge containing a reference to s 34 was not fatal. The evidence clearly revealed the role played by all three persons including the appellant in the transaction for the sale of the drugs. The judge found that the appellant himself was very much involved in the sale. Hence, the conviction with reference to s 34 was not bad in law. The appellant was in no way misled or prejudiced by the failure to amend the charge (see paras 43–44).

[Bahasa Malaysia summary

Perayu telah dituduh bersama-sama dengan dua tertuduh bersama atas kesalahan bagi mencapai niat mereka yang sama untuk mengedar 697.4g methamphetamine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dibaca bersama s 34 Kanun Keseksaan ('KK'). Perayu bersama-sama dengan dua orang tertuduh bersama yang lain telah menjual dadah kepada SP4, seorang pegawai polis yang bertindak sebagai seorang ejen provokatur. Hakim bicara yang terpelajar ('hakim') sebelum ini telah melepaskan dan membebaskan ketiga-tiga tertuduh di akhir kes pendakwaan atas alasan terdapat keraguan yang munasabah berkenaan dengan dadah yang menjadi persoalan dalam kes ini, iaitu, sama ada dadah yang dikemukakan sebagai keterangan dalam mahkamah ialah dadah yang sama yang dirampas oleh pasukan serbuan polis dan kemudiannya diperiksa dan dianalisis oleh ahli kimia. Pihak pendakwaan telah merayu terhadap keputusan itu. Hanya perayu sahaja yang hadir semasa rayuan. Dua lagi tertuduh bersama tidak dapat dikesan dan notis rayuan tidak dapat diserahkan kepada mereka. Rayuan terhadap dua orang lagi tertuduh bersama kemudiannya dibatalkan. Mahkamah Rayuan telah membenarkan rayuan oleh pihak pendakwaan itu dan memerintahkan supaya perayu membela diri. Semasa di Mahkamah Tinggi, setelah mendengar pembelaan oleh perayu, hakim telah mendapati bahawa perayu bersalah dan menjatuhkan hukuman mati. Hakim mendapati bahawa pembelaan perayu hanyalah suatu penafian semata-mata dan sesuatu yang difikirkan kemudian. Perayu merayu terhadap keputusan itu berdasarkan alasan yang berikut: (a) bahawa tidak terdapat dapatan yang jelas sama ada perayu mempunyai milikan sebenar ke atas dadah berbahaya itu atau dianggap memiliki di bawah s 37(d) ADB; (b) bahawa tidak terdapat dapatan yang jelas sama ada terdapat perbuatan terbuka mengedar di bawah s 2 ADB atau dianggap mengedar di bawah s 37(da) ADB; (c) bahawa hakim telah mensabitkan perayu atas pertuduhan walaupun terdapat keterangan yang jelas bahawa rantaian jagaan dadah yang dieksibitkan telah terputus; dan (d) bahawa panel Mahkamah Rayuan yang sebelum ini telah terkhilaf apabila membenarkan rayuan pihak pendakwaan dan menghantar balik kes ke Mahkamah Tinggi untuk perayu membela diri tanpa terlebih dahulu meminda pertuduhan dan membuang elemen niat bersama di bawah s 34 KK.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Tidak terdapat apa-apa keraguan bahawa kes terhadap perayu ialah dia telah membuat rundingan bagi penjualan dadah dengan SP4. Keterangan menunjukkan bahawa dadah itu dibawa secara fizikal ke dalam kereta SP4 oleh tertuduh kedua dan ketiga dengan kehadiran perayu. Itulah bagaimana pertuduhan niat bersama untuk mengedar dibuktikan terhadap perayu (lihat perenggan 26).

(2) Hakim tidak bergantung kepada mana-mana anggapan dan kes terhadap perayu adalah berdasarkan kepada keterangan mengedar secara terus di bawah s 2 ADB. Perbuatan terbuka yang sebenarnya ialah penjualan dadah oleh perayu bersama-sama dengan dua yang lain yang merupakan hal perkara pertuduhan ini. Perayu tidak mungkin dibiarkan dalam apa-apa keraguan berkenaan dengan kes terhadapnya (lihat perenggan 27).

(3) Pihak perayu sebelum ini telah dilepaskan dan dibebaskan kerana rantaian keterangan terputus. Walau bagaimanapun, dapatan ini telah diakaskan oleh Mahkamah Rayuan dan perayu telah diperintahkan untuk membela diri. Sekiranya perayu tidak berpuas hati dengan keputusan ini, suatu rayuan sepatutnya difailkan ke Mahkamah Persekutuan. Adalah sesuatu yang tidak dapat dipertahankan bagi perayu untuk membangkitkan isu yang sama sekali lagi dalam Mahkamah yang sama dan dalam kes yang sama. Panel Mahkamah Rayuan yang sedia ada tidak dapat mempertimbangkan tentang kebetulan keputusan oleh panel Mahkamah Rayuan sebelum ini. Hanya Mahkamah Persekutuan sahaja yang boleh berbuat sedemikian (lihat perenggan 32–33).

(4) Berhubung dengan kegagalan panel Mahkamah Rayuan sebelum ini yang dikatakan telah gagal untuk meminda pertuduhan apabila rayuan terhadap dua lagi tertuduh bersama telah dibatalkan, panel Mahkamah Rayuan yang sedia ada tidak mempunyai kuasa untuk mempertimbangkan kebetulan keputusan oleh panel Mahkamah Rayuan sebelum ini (lihat perenggan 34).

(5) Pertuduhan yang mengandungi rujukan kepada s 34 tidak *fatal*. Keterangan jelas menunjukkan peranan yang dimainkan oleh ketiga-tiga mereka termasuklah perayu dalam transaksi penjualan dadah itu. Hakim telah mendapati bahawa perayu sendiri terlibat dalam penjualan itu. Oleh yang demikian, sabitan dengan rujukan kepada s 34 tidak salah di sisi undang-undang. Perayu telah tidak diperdayakan atau diprejudiskan dalam apa-apa keadaan pun apabila pertuduhan gagal dipinda (lihat perenggan 43–44).]

Notes

For cases on amendment, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 1392–1394.

For cases on appeal in general, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 171–835.

For cases on s 39B(1)(a), see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 991–1005.

Cases referred to

Azhar bin Che Wil v PP [2010] 6 MLJ 22, FC (refd)
Harcharan Singh a/l Piara Singh v PP [2011] 6 MLJ 145, FC (refd)
Msimanga Lesaly v PP [2005] 4 MLJ 314; [2005] l CLJ 398, CA (refd)
Ooi Hock Kheng v PP [2014] 5 MLJ 585; [2015] 1 MLRA 425, CA (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
Saeid Reza Mohammadi Mohammad lwn Pendakwa Raya [2016] 4 MLJ 22, CA (distd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408; [2014] 4 CLJ 406, CA (distd)
Soorya Kumar a/l Narayanan @ Narayanasamy v PP [2011] 5 MLJ 774; [2009] 6 CLJ 257, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a)
Penal Code ss 34, 35, 302

Appeal from: Criminal Trial No 45A-12 of 2010 (High Court, Shah Alam)

Kitson Foong (Chew Jee San with him) (Kit & Assoc) for the appellant.
Mangaiarkarasi Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Harmindar Singh JCA:

[1] The appellant was charged with another two co-accused for having acted in furtherance of a common intention to traffic in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s 34 of the Penal Code.

[2] The charge against them with the appellant being the first accused and Wong Yew Weng and Neow Chen Yew, being the second and third accused respectively, read as follows:

> Bahawa kamu secara bersama-sama pada 5.10.2009, jam lebih kurang 3.30 petang, bertempat di kawasan tempat letak kereta, Hospital Sungai Buloh, di dalam daerah Gombak, dalam negeri Selangor Darul Ehsan, dalam mencapai niat kamu bersama-sama, telah mengedar dadah berbahaya iaitu Mehtamphetamine seberat 697.4 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.

[3] On the 21 February 2013, the learned trial judge acquitted and discharged all three accused at the end of the prosecution case. The grounds of judgment of the learned judge indicate that there was a reasonable doubt as to the drugs in question, namely, whether the drugs adduced into evidence were the same as the ones taken by the police arresting team and later examined and analysed by the chemist. In short, the learned judge was of the view that there had been a break in chain of custody of the drug exhibits in view of the difference in the weights recorded from the point of seizure to the point of analysis by the chemist.

[4] The public prosecutor then appealed to this court. However, only the appellant appeared during the appeal. The other two co-accused could not be traced and the notice of appeal could not be served on them. The appeal against the other two co-accused was then struck out.

[5] On 10 March 2015, after hearing the parties, this court by another panel allowed the public prosecutor's appeal against the appellant now before us. The court found that a prima facie case had been made out against the appellant and he was ordered to enter his defence before the same trial judge.

[6] Back in the High Court, after hearing the appellant's defence, the trial judge on 29 May 2015 found the appellant guilty of the charge of trafficking. He was accordingly convicted under s 39B(1)(a) of the Act and sentenced to death.

[7] The appellant then filed this appeal. We heard the appeal on 11 November 2016. We found no merits in the appeal. The appeal was accordingly dismissed. Our reasons for doing so now follow.

THE PROSECUTION CASE

[8] The facts as revealed during the case for the prosecution was as follows. On 2 October 2009, SP4 (Sjn Wong Soon Meng), a police officer attached to the Bahagian Narkotik JSJN Selangor, received information that a syndicate had offered to sell syabu at RM200,000 per kg. The said information also included a phone No 013-222217 said to be that of a Chinese man by the name of Ah Seng.

[9] SP4 then proceeded to call this Ah Seng using the phone number provided and introduced himself as Ah Meng. This Ah Seng agreed to sell to SP4 1kg of syabu at the price of RM190,000. The transaction was to take place at 8pm on 3 October 2009 at Restoran Nasi Kandar PJ, Pusat Bandar Puchong, Selangor.

[10] SP4 then informed his superior SP3 about his conversation with Ah Seng. SP4 was instructed to be the agent provocateur and a sum of RM30,000 in cash was given to him to make the purchase of the drugs.

[11] At about 8pm on 3 October 2009, SP4 arrived at the said restaurant in his vehicle, a Toyota Estima van, with the sum of RM30,000. At about 9pm, he met two Chinese men who introduced themselves as Ah Seng and Kolo. Ah Seng was later identified as the first accused at the trial and the appellant in this appeal and Kolo was identified as the second accused. SP4 then opened his bag and showed them the money in SP4's car. After making a phone call, the appellant informed SP4 that the sale had to be aborted.

[12] A new meeting date of 4 October 2009 was set up. It was to be at the Restoran McDonald near the Sungai Besi Toll. Although SP4 and another police officer ('SP11') met with the appellant and the second accused, this transaction was also aborted. It was then agreed that the drug sale would take place the next day at 4pm in the parking area of Hospital Sungai Buloh.

[13] On 5 October 2009, at about 2.45pm, SP4 together with SP11 arrived at the parking area of Hospital Sungai Buloh in the same Toyota Estima. They also brought the RM30,000. SP3 together with his police team were also there at the car park.

[14] The appellant and the second accused together with another Chinese man introduced as Kenny (later confirmed to be the third accused at the trial) arrived at the same place at about 4.30pm and met with SP4. The third accused asked SP4 to see the money and then told him that the drugs will arrive soon. All of them (SP4, SP11, the appellant, second and third accused) waited in SP4's vehicle.

[15] At about 5.30pm, the third accused received a call and he then told SP4 that the drugs have arrived. The second and third accused then got down from SP4's car and walked towards the hospital fence. The appellant continued to wait in the car.

[16] At about 6pm, a Proton Wira car arrived and stopped behind SP4's vehicle. The third accused was driving the said car whilst the second accused sat in the front passenger seat. When both the second and third accused alighted from the Proton Wira, SP4 came out from his vehicle and waited outside. The second accused then walked towards SP4 carrying a plastic transparent bag with his left hand. Then the second and third accused together with SP4 entered into SP4's vehicle. The second accused put the said plastic bag on the car seat.

[17] When SP4 saw the contents of the plastic bag and suspected them to be illicit drugs, he gave the pre-arranged signal to the police team waiting nearby. The police team led by SP3 then came to SP4's vehicle and arrested the appellant and the second and third accused.

[18] The plastic bag and its contents were also confiscated at the scene and later sent for analysis by the chemist. The chemist, SP2, confirmed that the said confiscated drugs was methamphetamine weighing 697.4g which formed the subject matter of the charge. It was on this evidence that the appellant was ordered to enter his defence.

THE DEFENCE CASE

[19] The appellant was the sole witness and elected to give evidence on oath. The evidence of the appellant was aptly summarised as follows by the learned trial judge:

19.1 OKT1 tidak mempunyai ibu bapa dan mempunyai lima orang adik beradik. Beliau dipanggil sebagai Ah Seng.

19.2 OKT1 menyatakan beliau hanya mengenali OKT2 lebih kurang seminggu lebih sebelum ditangkap dan beliau langsung tidak mengenali OKT3 sebelum tangkapan ke atas beliau berlaku.

19.3 Seterusnya, OKT1 menyatakan beliau megenali OKT2 setelah diperkenalkan oleh seorang kawan dan tujuannya adalah bagi melihat Feng Shui di rumah beliau. Ini kerana menurut OKT1, beliau yang dahulunya mempunyai kedai menjual telefon bimbit di Makro Selayang kini menghadapi kesukaran mencari rezeki kerana Makro telah dijual kepada Tesco dan beliau tidak lagi mempunyai perniagaan.

19.4 OKT1 juga menafikan bahawa beliau pernah dihubungi oleh SP4 dan menafikan beliau pernah menawarkan penjualan dadah kepada SP4. Seterusnya OKT1 menafikan pada bila-bila masa beliau telah menelefon SP4. Di dalam keterangannya, OKT1 menyatakan beliau bersama OKT2 telah datang makan di Restoran Nasi Kandar Puchong dan SP4 telah datang ke situ. Kemudian pada masa itu, OKT2 berdiri dan berkata 'hello' pada SP4 dan menunjukkan kepada SP4 ke arah beliau dan memperkenalkan beliau sebagai kawan.

19.5 OKT1 juga menafikan pernah memberitahu SP4 di Restoran Nasi Kandar Puchong bahawa transaksi penjualan dadah dibatalkan dan diatur semula di Restoran McDonald Sungai Besi pada keesokan hari.

19.6 Bagi perjumpaan di Restoran McDonald Sungai Besi, OKT1 menafikan beliau ada di dalam restoran tersebut tetapi mengaku bahawa beliau ada pergi ke stesen minyak yang ada restoran tersebut. Beliau seterusnya menyatakan OKT2 ada membawa beliau ke stesen minyak Shell dan apabila sampai di situ, beliau turun dari kereta dan

menghisap rokok manakala OKT2 berjalan pergi berjumpa SP4. OKT1 menyatakan beliau tidak turut serta berjumpa SP4. Malah beliau turut menafikan ada memberitahu SP4 bahawa 1kg syabu akan sampai tidak lama lagi kerana beliau tidak bercakap dengan SP4 kerana jarak beliau kira-kira 80 hingga 100 kaki jauhnya dari SP4

19.7 OKT1 juga menafikan ada memberitahu SP4 bahawa dadah akan sampai tidak lama lagi tetapi satu jam kemudian membatalkan transaksi penjualan dadah.

19.8 Bagi perjumpaan pada hari kejadian di tempat letak kereta di Hospital Sungai Buloh, OKT1 menafikan ada menghubungi SP4. OKT1 seterusya menyatakan pada hari kejadian, beliau datang ke Hospital Sungai Buloh bersama OKT2 dan apabila masuk ke kawasan parkir kereta, beliau nampak OKT3 berdiri di situ. Beliau menyatakan OKT2 telah turun dan bercakap dengan OKT3 namun OKT3 tidak diperkenalkan kepada beliau. Selepas itu beliau diminta oleh OKT2 untuk pergi ke kereta SP4, sebuah kereta Estima yang diletakkan di sebelah kanan tempat kereta. OKT1 menyatakan OKT2 tidak memberitahu mengapa beliau harus pergi ke kereta SP4

19.9 OKT1 juga menyatakan hanya beliau seorang masuk ke kereta tersebut dan beliau tidak tahu ke mana OKT2 dan OKT3 pergi. OKT1 juga menyatakan beliau telah duduk dalam kereta SP4 dari jam 4.30 petang hingga 6 petang dan dalam tempoh masa tersebut beliau telah berbual sedikit dengan SP4 dan SP11.

FINDINGS OF THE HIGH COURT

[20] Now the learned trial judge carefully evaluated the evidence of the appellant. The learned judge however found that the appellant had failed to cast a reasonable doubt on the prosecution case. The learned judge summarised his reasons for this finding as follows:

22.1. OKT1 tidak konsisten dalam keterangannya dan keterangan beliau diragui. Semasa kes pendakwaan, peguam bela OKT1 mencadangkan bahawa OKT1 tidak berada dalam kereta SP4 semasa beliau ditangkap. Tetapi, semasa kes pembelaan, OKT1 dalam keterangannya menyatakan beliau ada dalam kereta tersebut. Malah, OKT1 menyatakan beliau telah diminta untuk tunggu dalam kereta tersebut oleh OKT2 dan beliau telah mematuhi arahan OKT2 dan telah menunggu dari jam 4.30 petang hingga 6 petang pada hari kejadian dalam kereta tersebut.

22.2 OKT1 juga mengakui beliau ada bersama OKT2 ketika bertemu SP4 di Restoran Nasi Kandar Puchong dan beliau juga ada bersama OKT2 di sekitar Restoran McDonald Sungai Besi namun sekali lagi pembelaan yang dicadangkan sewaktu kes pendakwaan

mencadangkan OKT1 tidak berada di Restoran Nasi Kandar dan Restoran McDonald tersebut pada tarikh 3 dan 4 hari bulan Oktober 2009.

22.3 Sebaliknya, keterangan agent provocateur iaitu SP4 sepanjang masa adalah konsisten dan beliau berjumpa OKT1 di Restoran Nasi Kandar Puchong pada 3 Oktober 2009 dan sekali lagi berjumpa di Restoran McDonald pada 4 Oktober 2009. SP4 juga menyatakan OKT1 telah berada dalam kereta tersebut bersama beliau dan OKT2 pada 5 Oktober 2009 iaitu hari kejadian. Keterangan OKT1 bahawa beliau tidak bercakap dengan SP4 ketika berada di Restoran McDonald pada 4 Oktober 2009 kerana beliau berada 80 hingga 100 kaki jauhnya dari SP4 juga tidak konsisten. Sebaliknya, keterangan SP4 yang menyatakan OKT1 dan OKT2 telah memaklumkan SP4 bahawa dadah akan sampai tidak lama lagi dan sementara menunggu mereka semua telah berbincang tentang harga pasaran dadah syabu dan eramin 5 langsung tidak dicabar pembelaan. Dalam keadaan seperti ini keterangan SP4 sewajarnya diterima — lihat *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212.

22.4 Dalam pertemuan-pertemuan dengan SP4 pada 3 Oktober 209 (di Restoran Nasi Kandar) dan pada 4 Oktober 2009 (di Restoran McDonald), OKT1 memberi gambaran seolah-olah beliau adalah seorang yang naif dan hanya mengikut OKT2 sepanjang masa. Begitu juga pada hari kejadian (di tempat parkir kereta Hospital Sungai Buloh) semasa beliau disuruh oleh OKT2 untuk tunggu di dalam kereta SP4, OKT1 seolah-olah hanya mengikut sahaja arahan OKT2 tanpa bertanya walaupun beliau menyatakan hanya mengenali OKT2 lebih kurang seminggu sebelum ditangkap. Persoalan yang timbul di sini adalah adakah OKT1 betul-betul naif dan tidak tahu apa yang berlaku pada masa kejadian? Sepanjang masa hampir dua jam OKT1 duduk di dalam kereta SP4, adakah beliau begitu naif sehingga tidak bertanya apa yang sedang berlaku walaupun beliau menyatakan ada berbual-bual sedikit dengan SP4 dan SP11? Saya mendapati OKT1 bukanlah seseorang yang begitu naif lagi tolol memandangkan beliau dahulunya adalah seorang peniaga dan mempunyai perniagaan kedai menjual telefon bimbit sendiri. Saya telah meneliti keterangan OKT1 dan saya mendapati pembelaan OKT1 hanyalah suatu penafian kosong semata-mata.

22.5 Peranan yang dimainkan oleh OKT1 seperti keterangan SP4 jelas sekali. Orang yang menjawap panggilan telefon yang pertama kali dibuat oleh SP4 atas nombor yang dberikan oleh sumbernya memperkenalkan dirinya sebagai Ah Seng. Ah Seng inilah yang bersetuju untuk menjual 1kg syabu melalui perbualan telefon tersebut dengan harga RM190,000 dan menetapkan transaksi pada 3 Oktober 2009 di Restoran Nasi Kandar, Puchong pada jam 8 malam oleh Ah Seng ini juga. Seterusnya dalam pertemuan di Restoran Nasi Kandar tersebut, SP4 telah bertemu dengan dua lelaki Cina iaitu OKT1 dan OKT2. OKT1 memperkenalkan dirinya

sebagai Ah Seng. OKT1 ini juga telah melihat 'flash money' yang dibawa SP4 dan OKT1 ini juga yang kemudannya memaklumkan SP4 bahawa transaksi pada malam tersebut dibatalkan dan sebaliknya akan dibuat pada esok hari, 4 Oktober 2009, di Restoran McDonald, berhampiran dengan Tol Sungai Besi.

22.6 Dalam perjumpaan di Restoran McDonald pada 4 Oktober 2009, OKT1 juga hadir dan beliaulah orangnya yang memaklumkan SP4 bahawa transaksi pada hari tersebut turut dibatalkan dan tarikh baru akan ditetapkan kemudian. OKT1 jugalah orangnya yang kemudiannya menelefon SP4 untuk memaklumkan SP4 bahawa transaksi tersebut akan diadakan pada 5 Oktober 2009 di kawasan parkir kereta, Hospital Sungai Buloh pada kira-kira jam 4 petang.

22.7 Seperti dijanjikan OKT1 turut hadir di pertemuan di parkir kereta Hospital Sungai Buloh bersama-sama dengan OKT2 dan OKT3 pada kira-kira jam 4.30 petang. Ketika OKT2 dan OKT3 pergi mengambil dadah pada kira-kira jam 5.30 petang, OKT1 setia menunggu di dalam kereta SP4.

22.8 Nyata OKT1 memainkan peranan yang aktif dalam transaksi penjualan/pengedaran dadah tersebut. OKT1 bukanlah pak turut yang tidak tahu apa-apa yang menuruti sahaja kehendak OKT2 seperti yang cuba digambarkan oleh OKT1. Pun begitu OKT1 juga tidak berada di ketiga-tiga tempat kejadian (di Restoran Nasi Kandar, di Restoran McDonald dan di tempat parker kereta di Hospital Sungai Buloh) secara kebetulan seperti juga yang digambarkan oleh beliau tetapi telah berada di ketiga-tiga tempat kejadian tersebut menurut rancangan yang beliau (OKT1) sendidi telah aturkan bersesuaian dengan agenda untuk menjual dadah tersebut kepada SP4.

[21] In essence, the learned trial judge found the defence of the appellant to be a mere denial which failed to dislodge the prosecution case which was compelling. The judge took note of the fact that the appellant had failed to put forward his version of events during the prosecution case. The story was first revealed in the defence case. The learned judge came to the view that this story of the appellant was an afterthought.

[22] In the event, the learned trial judge was satisfied that the prosecution had succeeded in proving the charge against the appellant beyond a reasonable doubt. The appellant was accordingly found guilty, convicted and sentenced to death.

A THE INSTANT APPEAL

[23] Before us the conviction of the appellant was assailed on a number of grounds. The first ground was that the learned trial judge erred in law when he convicted the appellant without a clear finding as to whether the appellant was in actual possession of the dangerous drugs or presumed possession under s 37(d) of the Act. The second ground which is related to the first is that the trial judge erred in law when he convicted the appellant without a clear finding as to whether there was an overt act of trafficking under s 2 of the Act or presumed trafficking under s 37(da) of the Act.

[24] The third ground was that the learned trial judge erred in law when he convicted the appellant despite there being clear evidence of break in the chain of custody of the drug exhibits. The fourth and last ground was that the earlier panel of the Court of Appeal on 10 March 2015 had erred in law in allowing the prosecution's appeal and remitting the case back to the High Court for the appellant to enter his defence without first amending the charge and removing the element of common intention under s 34 of the Penal Code.

[25] The first two grounds are connected and can be taken together. In essence, the appellant is saying that since there was nothing expressly stated in the grounds of judgement of the High Court and further, since no grounds of decision of the Court of Appeal was available, there was no affirmative finding of possession and trafficking at the end of the prosecution case. The appellant was therefore left in doubt as to whether the courts had imputed on him 'actual possession' or 'presumed possession'. Without the benefit of the clear expression of such a finding, it was submitted that the appellant was left in doubt whether the burden of proof imposed on him was to raise a reasonable doubt or to rebut the statutory presumption on a balance of probabilities.

[26] On this score, there cannot be any doubt that the case against the appellant was that he had entered into negotiations for the sale of the drugs with SP4. The evidence showed that the drugs were physically brought into SP4's car by the second and third accused in the presence of the appellant. That is how the charge of common intention of trafficking was made out against the appellant. The findings of the learned trial judge is clear in this regard in the grounds of judgment as follows:

> 25.2 ... Apa yang pendakwaan perlu buktikan adalah wujudnya perbincangan dan persetujuan untuk menjual dadah oleh OKT1, OKT2 dan OKT3 dengan harga RM190,000 1kg. Keterangan menunjukkan transaksi ini benar-benar wujud apabila OKT1 bersama-sama OKT2 dan OKT3 hadir di tempat yang dijanjikan di kawasan parkir kereta Hospital Sungai Buloh untuk memuktamadkan transaksi tersebut. Niat dan tujuan ketiga-tiga OKT menjadi lebih nyata apabila setelah melihat 'flash money' tersebut, dan kemudiannya menerima panggilan telefon dari

seseorang, OKT3 dan OKT2 telah meninggalkan SP4 dan OKT1 dalam kereta SP4 dan setengah jam kemudian, OKT2 dan OKT3 kembali dengan membawa dadah yang hendak dijual tersebut. Tidak syak lagi 'conduct' mereka menjual dadah kepada SP4 adalah terjumlah dalam definisi mengedar di bawah s 2 Akta Dadah Berbahaya 1952.

[27] This finding makes it clear that the learned trial judge did not rely on any presumptions and the case against the appellant was on direct evidence of trafficking under s 2 of the Act. The overt act is really the sale of the drugs by the appellant with two others which was the subject matter of the charge. We do not see how the appellant could have been left in any doubt as to the case against him. The duty on the appellant, as it was clear, was merely to raise a reasonable doubt on the prosecution case.

[28] Learned counsel for the appellant relied on two decisions of this court in *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; [2014] 4 CLJ 406 ('Seyedalireza') and *Saeid Reza Mohammadi Mohammad lwn Pendakwa Raya* [2016] 4 MLJ 22 ('Saeid Reza'). With respect, in our view, these cases can be distinguished. In *Seyedalireza*, the trial judge had invoked both presumptions under s 37(d) and (da) of the Act in the alternative. This approach was criticised by this court on appeal in that it was incumbent upon the trial judge to make a finding as to which presumption was relied upon as there had to be a certainty as to the presumption before the defence was called. In other words, the trial judge must make a finding of whether there was actual or presumed trafficking. Failure to do so would prejudice the accused person.

[29] In the instant appeal, however, there is no such confusion as the case of the prosecution was not based on possession but on direct evidence of trafficking by way of sale of drugs under s 2 of the Act. It is trite that a person can be convicted of trafficking without ever being in possession of the drugs in question where for example it involved sale of drugs. It may be harder to prove such trafficking if no drugs are ever recovered but in theory a conviction is possible if the evidence of sale is compelling and overwhelming and no doubt is raised. In the circumstances, we say with respect that the case of *Seyedalireza* offers no assistance to the appellant.

[30] As for the case of *Saied Reza*, again there was confusion as to whether the presumption was relied upon for possession and trafficking. This court again found that there was misdirection by way of non-direction on the element of possession which was crucial in that case. For the same reasons, we find that this case is not helpful to the appellant as the facts are different.

[31] We should add that this confusion on the application of the presumptions has found expression in a number of decisions of this court. See, for example, *Soorya Kumar a/l Narayanan @ Narayanasamy v Public Prosecutor* [2011] 5 MLJ 774; [2009] 6 CLJ 257; *Ooi Hock Kheng v Public Prosecutor* [2014] 5 MLJ 585; [2015] 1 MLRA 425 and *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649. These cases, however, do not offer any assistance to the appellant as the case against the appellant is one of direct trafficking as defined under s 2 of the Act. No presumptions were ever needed and the appellant, who was represented by counsel, suffered no prejudice as he would know the case he would have had to meet in the event defence was called. In the circumstances, there is no merit in the first two grounds canvassed by the appellant.

[32] On the third ground of break in the chain of evidence, we take note that the appellant was acquitted on account of there being a break in the chain of evidence. This was principally because there was a drastic difference between the weights recorded from the point of seizure to the point of analysis by the chemist.

[33] However, this finding was reversed by this court and the appellant was ordered to enter his defence. If the appellant was dissatisfied with this decision, an appeal ought to have been filed to the Federal Court. It is untenable for the appellant to raise the same issue again in the same court in the same case. With respect, we are unable to look into the correctness of the decision of the earlier panel of this court. Only the Federal Court can do so. This issue is too trite to require any reference to authority. Suffice it to say that this ground is also without merit.

[34] We now come to the final ground of appeal. This concerned the alleged failure of the earlier panel of this court to amend the charge when the appeal against the two other co-accused had been struck out. In this connection, we must at once reiterate and at the risk of repetition, that we have no power to look into the correctness of the decision of the earlier panel of this court.

[35] In order to be fair to the appellant, we would however look at this question in a different sense to see if the trial court was right to convict the appellant on a charge of trafficking with common intention with two co-accused when the co-accused remained acquitted and discharged leaving the appellant as the sole accused. Since this question was raised in court when it first came up for hearing, we asked the parties to put in further submissions.

[36] Now learned counsel for the appellant submitted that the appellant could not be said to have acted in furtherance of a common intention with the co-accused having been acquitted. This charge involving common intention

cannot be proved by the prosecution. It was further asserted that the charge ought to have been amended to remove the element of common intention.

[37] In this regard, the appellant relied on the decision of this court in *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314; [2005] l CLJ 398 where it was stated:

> Taking the first ground, it is important to recall that the appellant was initially charged with another person. Accordingly, the charge carried in it the allegation that the two accused had acted in furtherance of a common intention under s 34 of the Penal Code. Once the co-accused was acquitted at the close of the prosecution's case, the allegation of common intention fell to the ground. The charge had to be amended to reflect the fact that the appellant had solely trafficked in the drug in question. It was. But the wording in the charge was not so perfectly amended as to rid itself of all references to the element of the appellant having acted with another person. That in our view does not render the charge bad. For, it is well settled law that s 34 of the Penal Code does not create a substantive offence but is merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons.

[38] In response, we have been referred by the learned DPP to the Federal Court case of *Azhar bin Che Wil v Public Prosecutor* [2010] 6 MLJ 22. This was a case where initially seven persons were charged for murder under s 302 of the Penal Code. In the end, only the first accused was convicted whilst the rest were acquitted. It was submitted that the learned trial judge was in error in not amending the charge under s 302 read with s 35 to one under s 302 only against the first accused after all the other accused had been acquitted and discharged without their defence being called.

[39] The Federal Court noted that s 35 like s 34 does not create a substantive offence but merely a rule of evidence open to the prosecution where several accused persons are alleged to be involved in the commission of an offence. For convenience, ss 34 and 35 are reproduced as follows:

> 34 When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.
>
> 35 Whenever an act, which is criminal only by reason of its being done with criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

[40] In this connection, the Federal Court held:

(1) The non-deletion of reference to the co-accused and s 35 in the charge either at the close of the prosecution's case or at the close of the defence's

case did not render the charge bad in law. It is merely a rule of evidence open to the prosecution when several accused persons are alleged to be involved in the commission of an offence; *Harcharan Singh a/l Piara Singh v Public Prosecutor* [2011] 6 MLJ 145 followed (see para 24).

(2) Section 34 provides for a case in which a criminal act was done by several persons in furthermore of a common intention. However s 35 refers to a situation where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention and each person is liable for the act to the extent of his knowledge or intention. Under s 35, the court has to consider what is the knowledge or intention of each person who joined in committing the act (see para 26).

(3) The fatal injury that caused the victim's death was inflicted by the first accused. The assaults on the victim involving second to seventh accused persons could not have caused the death of the victim. Thus, when the second to seventh accused were acquitted and only the first accused was ordered to enter his defence, the first accused had to be aware of the evidence against him. This was especially so when he was represented by counsel (see para 28).

(4) The first accused was in no way misled or prejudiced by the non-amendment of the charge. The way the defence was presented made it amply clear that the first accused fully appreciated the nature of the charge against him and the nature of the prosecution's case (see para 29).

(5) Even without the charge being amended, the first accused — who was represented by counsel — was not precluded from recalling or re-summoning any witness or to call for further evidence. This was not done. Thus, the question of miscarriage of justice as contended by counsel, did not arise ; *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 followed; *Moosa Abdul Rahman v The State of Kerala* [1982] Cr LJ 1384 referred (see paras 30 & 32).

(6) The omission of the trial judge to amend the charge either at the close of the prosecution's case or at the close of the defence's case, so as to delete any reference in the charge to the co-accused and to s 35 of the Penal Code did not cause any prejudice or injustice to the first accused. It did not render the charge bad against the first accused. The fact that the other co-accused had been acquitted had no bearing on the case against the first accused. Accordingly, there was nothing irregular concerning the conviction of the first accused on the charge of murder (see para 33).

[41] Of particular significance is that the Federal Court referred to with approval the Federal Court decision in *Harcharan Singh a/l Piara Singh v Public Prosecutor* [2011] 6 MLJ 145. The circumstances prevailing in that case are not too dissimilar with the instant appeal. The facts were set out as follows (at p 31):

> In that case, Harcharan Singh a/l Piara Singh together with one Jasbir Singh were charged for murder under s 302 of the Penal Code read together with s 34 of the same Code. Both were convicted but on appeal their conviction were quashed and

they were set free. The prosecution being dissatisfied with the result appealed to this court. In the meantime, Jasbir Singh, an Indian national returned to India after his acquittal. The notice of appeal was not able to be served on Jasbir Singh. After several attempts failed, the appeal against Jasbir Singh was withdrawn. The prosecution only pursued the appeal against Harcharan Singh. The issue raised was whether the appeal against Harcharan Singh can succeed when there is no appeal against Jasbir Singh, viewing the case in the light of the allegation of common intention under s 34 of the Penal Code.

[42] Speaking for the Federal Court, Gopal Sri Ram FCJ held:

It is well established that s 34 of the Penal Code does not create a substantive offence but is merely a rule of evidence to infer joint responsibility for a criminal act perfomed by plurality of persons. See *Teh Thiam Huat v Public Prosecutor* [1996] 3 SLR 631. It follows that where two or more persons are charged with an offence and s 34 is prayed in aid to alleged common intention, the acquittal of all save one does not render the charge bad against that one who may be lawfully convicted on the charge which contains a reference to s 34.

[43] Coming back to the instant case, we similarly held that the charge containing a reference to s 34 is not fatal. The evidence as accepted by the trial judge clearly revealed the role played by all three persons including the appellant in the transaction for the sale of the drugs. The learned trial judge found that the appellant himself was very much involved in the sale when he made his findings as follows:

Nyata OKT1 memainkan peranan yang aktif dalam transaksi penjualan/pengedaran dadah tersebut. OKT1 bukanlah pak turut yang tidak tahu apa-apa yang menuruti sahaja kehendak OKT2 seperti yang cuba digambarkan oleh OKT1. Pun begitu OKT1 juga tidak berada di ketiga-tiga tempat kejadian (di Restoran Nasi Kandar, di Restoran McDonald dan di tempat parkir kereta di Hospital Sungai Buloh) secara kebetulan seperti juga yang cuba digambarkan oleh beliau tetapi telah berada di ketiga-tiga tempat kejadian tersebut menurut rancangan yang beliau (OKT1) sendiri telah aturkan bersesuaian dengan agenda untuk menjual dadah tersebut kepada SP4.

Mengambil kira keseluruhan hal ehwal keadaan kes ini, saya mendapati bahawa pembelaan OKT1 hanyalah pembelaan yang bersifat penafian semata-mata. OKT1 menafikan setiap perincian yang 'incriminate' dirinya. Sungguhpun begitu penafiannya gagal untuk 'dislodge' kes pendakwaan yang cukup kukuh memerangkapnya.

[44] For the aforesaid reasons, we do not consider the conviction with reference to s 34 to be bad in law. Having perused the record of proceedings, we are satisfied that the appellant was in no way misled or prejudiced by the failure to amend the charge. The contention that he lost the right to recall witnesses in the event the charge was amended is without merit. The question of recalling

witnesses was always open to the appellant (see *Azhar bin Che Wil v Public Prosecutor*).

CONCLUSION

[45] In conclusion, and for the reasons stated, and considering the entirety of the evidence added, we found that the conviction against the appellant was safe and appellant interference was unwarranted. In the upshot, we unanimously dismissed the appeal and affirmed the conviction and sentence by the High Court.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum